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No. 06-652

In the

Supreme Court of the United States

BART DIDDEN, et al.,

Petitioners,

v.

VILLAGE OF PORT CHESTER, NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What limits do the Fifth and Fourteenth Amendments place on a state actor's demands for cash in exchange for refraining from or using the power of eminent domain?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also has participated as amicus curiae in important property rights cases before this Court. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). At present, PLF attorneys are involved in many exactions cases, including one in which the property owners were forced to waive their right to vote in exchange for a building permit. *Griswold, et ux. v. City of Carlsbad*, No. 06-CV-1629-R-LSP (S.D. Cal. filed Aug. 14, 2006). PLF attorneys also have written extensively on eminent domain, exactions, and other important property rights issues. *See, e.g.*, Timothy Sandefur, *Cornerstone of Liberty: Property*

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[1] Pursuant to Supreme Court Rule 37.6 counsel for a party did not author this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

Rights in 21st Century America (2006); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002).

Because of its history and experience with regard both to the power of eminent domain, and to exactions demanded by government in exchange for the right to use property, PLF believes its perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

The district court dismissed this case on the grounds that the injury to the property owners accrued when the city adopted its redevelopment plan, and not when the property owners were approached with the extortionate demand that they pay $800,000 to avert the condemnation of their property. The court declared that "'threats to enforce a party's legal rights' are not actionable," *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004) (citing *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir. 1982)), and since this threat was not a cognizable injury, the court held that the complaint was barred by the statute of limitations. The court of appeals summarily affirmed. *Didden v. Vill. of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006).

The consequence is simply this: where the government's chosen developer, acting under color of state law, uses the threat of eminent domain to exact a cash payment from a property owner, by offering to refrain from taking the land if the owner pays up, the property owner has not been legally injured. This holding is plainly wrong, and creates a dangerous precedent on an important matter of federal law, opening the door to extortionate demands by government and politically well-connected developers. In *Nollan*, 483 U.S. 825, this Court recognized the danger posed by government agents who try to "leverage" the police power for economic advantage, *id.* at 837

n.5. Yet as this case indicates, local officials in the years since *Nollan* have only increased their use of sovereign authority as a means of extracting concessions from property owners who ask for permission to use their land. The prevalence of such exactions is a national problem, and certiorari is warranted here to limit this abuse of property owners' rights, and its pernicious economic consequences.

This case combines the concerns about the leveraging of the police power with the increasing problem of eminent domain abuse. *Nollan* and *Dolan* were written out of a concern that the government would use its power over property to demand unfair concessions from owners who seek permission to use their land, and who are essentially at the government's mercy in the permitting process. But given this Court's decision in *Kelo*, 125 S. Ct. 2655, which granted extensive discretion to government when using its eminent domain powers, government officials (or private parties acting under color of law) now also are able to use *eminent domain* as leverage to demand such concessions.

Thus the petition should be granted for three reasons.

1. Lower courts are divided on whether the limits of *Nollan* and *Dolan* apply to demands for cash as well as to demands for the relinquishment of real property rights. This confusion has fostered a system of exploitation of property owners which is making it increasingly difficult for the poor and members of the middle class to find homes. This case presents the issue squarely: does the Constitution limit a state actor's ability to demand that a property owner make a cash payment in exchange for permission to use the land?

2. The use of eminent domain as "leverage" for demanding a payment from a property owner implicates this Court's unconstitutional conditions jurisprudence—enunciated in *Nollan* and *Dolan*—and, if allowed to continue, will harm property owners even more in the wake of *Kelo*.

3. Lower courts need guidance as to what degree of scrutiny to use in cases in which the use of eminent domain will benefit particular, identifiable private parties. This question was left open by *Kelo*, where four justices rejected the application of heightened scrutiny, four justices would have required it, and Justice Kennedy's concurrence deferred the question for another day.

ARGUMENT

I

THE DISTRICT COURT'S FINDING THAT THE PROPERTY OWNERS WERE NOT INJURED WHEN A STATE ACTOR DEMANDED A CASH PAYMENT AS TERMS FOR NOT USING EMINENT DOMAIN RAISES AN IMPORTANT QUESTION OF FEDERAL LAW

The district court decided, and the court of appeals affirmed, that "threats to enforce a party's legal rights are not actionable." *Didden*, 322 F. Supp. 2d at 390. Yet this Court and several courts of appeal have held that government may not use legal authority as a club with which to extort payments from people. Cases like *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374, rested on the basic principle that government agents should not be allowed to "sell" exceptions to the police power, because, as a realistic matter, agencies and officials acting under state authority would use this as a tool of extortion. Although this case involves eminent domain rather than the police power,[2] the concern remains the same: government may

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[2] This Court has held that the division between these two principles is not always clear. *See, e.g., Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *Kelo*, (continued...)

not use its power to regulate land use to demand concessions from property owners in exchange for permission to use their land. Cases in several different legal fields—property rights, criminal law, and even the law of contract—recognize that the threat to exercise a power can be a wrongful, coercive act, even where the power is legally vested and might otherwise be lawfully enforced.

A. The Court Below Ignored This Court's Repeated Rulings That Government May Not Use Its Powers to Coerce Property Owners Into Giving Up Their Rights

In *Nollan*, this Court explained that for government to use its (otherwise legitimate) permitting powers as a means for demanding that property owners relinquish their rights would amount to "an out-and-out plan of extortion." 483 U.S. at 837 (citation omitted). The *Nollan* "nexus" requirement was necessary to prevent government from exploiting property owners, and extracting from them payments which, in all fairness and justice, ought to be paid by the taxpayers as a whole. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus government may demand a concession from a property owner in exchange for a use permit only when that concession has some logical relationship to a genuine public injury caused by the proposed use. "When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." *Nollan*, 483 U.S. at 837. Although the government could certainly forbid "shouting fire" or causing other injuries, selling exceptions to that prohibition would "alter[] the purpose" of the law's prohibition, and would "not pass constitutional muster."

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[2] (...continued)
125 S.Ct. at 2685 (Thomas, J., dissenting) (describing how the Court has "equat[ed] the eminent domain power with the police power").

Id. In a footnote, the Court added that allowing "this kind of leveraging of the police power" would lead to "stringent land-use regulation which the State then waives to accomplish other purposes." *Id.* at 837 n.5. The present case fulfills this prediction: here, the de eloper threatened the property owner with the most severe form of land use control—the outright confiscation of his fee—but then offered to waive that act in exchange for $800,000.

In *Dolan*, the Court reiterated its concerns about improper leveraging:

> The government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S. at 385. Thus *Dolan*, like *Nollan*, prohibited the use of government's otherwise legitimate regulatory authority as a way to pressure property owners to give up some value to the government. In addition, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the government contended that no taking had occurred when a property owner was forced to install a wire cable as a condition of renting out the property, because the owner could have chosen not to rent out the property, and thereby avoided the taking. This Court rejected the argument: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation," the Court explained. *Id.* at 439 n.17. But the "choice" faced by the property owners in this case is similar to the "choice" the property owner was offered in *Loretto*: your money or your property rights. In *Loretto*, the Court held that a property owner could not be forced, as a condition of using his or her property in a legitimate way, to give up a property right. The same rule ought to apply here.

As these cases illustrate, the *Nollan* rule "involve[s] a special application of the 'doctrine of "unconstitutional conditions,"' which provides that 'the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385). When government—or a person acting with government authority—makes a demand of a property owner in exchange for granting the owner the freedom to use her property, it is limited to doing so in cases where those demands "rectif[y] only those public problems that flow from the development.... Those exactions that are not needed to offset the actual impact of development are presumed to flow from an improper desire to obtain property without paying for it." Breemer, *supra*, at 397.

Although this case involves eminent domain, instead of the police power, it nevertheless presents this Court with an even more stark example of the abuses with which *Nollan* and *Dolan* were concerned: the property owners were ordered, as a condition of retaining their property rights, to give up $800,000. Yet this case has a still more troubling feature: where the land transfers demanded in *Nollan* and *Dolan* would at least have been retained by the government—the beach access in *Nollan* and the easement demanded in *Dolan* would have been owned by the government—here, the money demanded by the developer would have been transferred to a *private party*, not to public ownership. Had the owners acceded to the demand, therefore, the developer would have essentially "condemned" $800,000 directly into its own pocket. This exploitation of public power to seize money at will for purely *private* benefit violates one of the fundamental purposes of the Constitution. *Cf. Kelo*, 125 S. Ct. at 2661 ("the City would no

doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party").

B. The Decision Below Endangers Longstanding Precedent That Threatening to Exercise a Lawful Power Unless a Person Gives Up a Payment Can Constitute Legal Injury

The concern underlying *Nollan* and *Dolan*—that government could use its power to extort property from citizens—is echoed in several other areas of the law, as well. In each instance, courts have found that where a party threatens another—even with the exercise of lawful authority—if the other party does not pay up, the law has been violated. A police officer has the discretion to write a speeding driver a ticket or to let the driver off with a warning, but demanding a payment in exchange for being let off with a warning would be a violation of the law. In any one of the countless instances in which a government agent has discretionary power, it would be a wrongful act for the agent to exercise that discretion on the basis of a wrongful motive such as a demand for cash payment. Corruption, in fact, has been defined as "the misuse of office for unofficial ends." Robert Klitgaard, *International Cooperation Against Corruption*, 35 Fin. & Dev. 3, 4 (1998).[3] One of the primary purposes of written laws and a written Constitution—and the motivation behind *Nollan* and *Dolan*—was to protect people from the arbitrary exercise of authority, including the wrongful use of power that might otherwise be lawful, to accomplish illegitimate purposes.

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[3] The United Nations Convention Against Corruption art. 15(a) defines the term as including "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." *See* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf (last visited Dec. 8, 2006).

Like the law of property rights, the criminal law has long recognized that an official threatening to use government power unless a person makes a payment could qualify as extortion. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695, 1702 n.25 (1993). In fact, the Hobbs Act defines extortion as "the obtaining of property from another, with his consent . . . under color of official right," 18 U.S.C. § 1951(b)(2), and the New York Penal Code defines "coercion" as

> compel[ling] or induc[ing] a person to engage in conduct which the latter has a legal right to abstain from engaging . . . by means of instilling in him a fear that, if the demand is not complied with, the actor or another will . . . [u]se or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

N.Y. Penal Law § 135.60(8). This appears to be an accurate description of what is alleged in the complaint. Moreover, this Court has recognized in that the common-law crime of extortion is implicated "when the public official receives a payment in return for his agreement to perform specific official acts." *See Evans v. United States*, 504 U.S. 255, 268 (1992).

Also, in the realm of contract law, the threat to exercise a legal right *can* sometimes constitute duress. In *Link v. Link*, 179 S.E.2d 697 (N.C. 1971), a cuckolded husband demanded that his wife sign over some stock certificates or he would institute divorce proceedings. The court found that this could qualify as duress even though the husband could legally have begun proceedings against her. "Ordinarily," the court held, "it is not wrongful . . . for one to procure a transfer of property by stating in the negotiations therefor that, unless the transfer is

made; he intends to institute or press legal proceedings to enforce a right which he . . . has," *id.* at 705, but

> modern authority supports the rule . . . that the act done or threatened may be wrongful even though not unlawful, per se; and that the threat to institute legal proceedings, . . . which might be justifiable, per se, becomes wrongful . . . if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

Id. at 705. *Accord, Radford v. Keith*, 584 S.E.2d 815, 818 (N.C. Ct. App. 2003). The Minnesota Supreme Court has also held that a person may have a right to institute legal proceedings,

> [b]ut . . . has no right to threaten another, in order to accomplish an ulterior purpose . . . with an action to enforce some just legal demand where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use legal process as to oppress his adversary and to cause him unnecessary hardship. A threat to so use legal process constitutes duress where its coercive effect is to overcome the free will of the victim.

Wise v. Midtown Motors, Inc., 42 N.W.2d 404, 407-08 (Minn. 1950). As cases like these reveal, a threat to exercise a legal right can, under certain circumstances, constitute unfair dealing and a legal injury. *See also* Restatement (Second) of Contracts § 176(2)(c) (1981) ("A threat is improper if the resulting exchange is not on fair terms, and what is threatened is otherwise a use of power for illegitimate ends.")

In *Philippine Export & Foreign Loan Guar. Corp. v. Chuidian*, 218 Cal. App. 3d 1058 (Cal. Ct. App. 1990), the California Court of Appeal examined at length the issue of whether the threat to institute legal proceedings can be a

wrongful threat. "[A] person, generally speaking, has a perfect right to prosecute a lawsuit in good faith," the court noted, but "clearly that proposition cannot always be true." *Id.* at 1079. The right to file a lawsuit "has limits .... [W]hen we consider the legitimacy of conduct consisting of attempts to achieve a favorable settlement of litigation, we must also accommodate the values of the adversary system and the rights of persons to be free from pressure that is perceived as 'wrongful.' " *Id.* at 1079-80. Thus, although "[t]he area is fraught with difficulty and each case must depend on a careful weighing of all the circumstances," there are cases in which the threat to exercise a legal right *can* be a legally cognizable harm. *Id.* at 1080.

The decision below conflicts with the long-standing law of several jurisdictions—that threats to exercise government's otherwise lawful use of power are prone to abuse, and such abuses are wrongful acts that courts ought to redress. The court of appeals' summary affirmation provides no explanation for this radical change, which is particularly troubling. This case therefore raises an important question of federal law that must be determined by this Court.

II

OFFICIAL ABUSE OF POWER TO EXTRACT DEMANDS FROM PROPERTY OWNERS IS BECOMING INCREASINGLY COMMON IN THE UNITED STATES

In *Nollan* and again in *Dolan*, this Court sharply rebuked government officials who use their sovereign powers as leverage to extract money, land, or other values from property owners. Unfortunately, state and local governments have continued to engage in such activities. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1513 (2006) ("In the last several decades, there has been a marked shift in local government

financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions.")

Like the property owners in *Nollan* and *Dolan*, the property owners in this case were ordered to give up a value in exchange for permission to use the property that belonged to them. But State Supreme Courts are divided—as are federal circuit courts—as to whether the standards enunciated in *Nollan* and *Dolan* apply to government demands of cash payments, or whether they are limited only to government demands of real property transfers. This case presents the Court with an important opportunity to resolve that conflict.

In addition, as described in Part II.B below, the continuing use of government's power over real property as a mechanism for demanding that property owners give up either cash payments or real property rights has become a serious threat to the nation's economy. Although it is impossible to say exactly what affect it's having in the business community, abuses by local governments are harming homeowners, and increasing the scarcity of housing. This Court should grant certiorari to address this growing problem.

A. Courts Are Divided Over *Nollan*'s Applicability to Monetary Exactions

Both *Nollan* and *Dolan* involved demands by the government that property owners give up some interest in property. But this Court has not addressed the question of whether the *Nollan* and *Dolan* rules apply to demands for cash payments as well as for real property. In *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996), the California Supreme Court held that the rules do apply, because the concern underlying these cases was that government could use its authority to compel property owners to give up some of their rights in exchange for a permit, and these concerns were equally present with regard to money demands, as to real property demands. Texas and Arizona

courts have agreed, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997). There are many others. *See, e.g., Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994).

Yet the Colorado Supreme Court has rejected this view, holding that *Nollan* and *Dolan* apply narrowly only to demands for real property. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001). The Ninth and Tenth Circuits have followed this route. *See Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Commercial Builders of Northern Cal. v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). This Court has been repeatedly asked to resolve this question. *See, e.g., Drebick v. City of Olympia*, 127 S. Ct. 436 (2006); *Hammer v. City of Eugene*, No. 05-1643 (U.S. Sup. Ct. *cert. denied* Oct. 2, 2006). This case presents an important opportunity to settle this issue, and to clarify that the constitutional limits which forbid extortionate or unrelated demands from property owners are applicable to monetary exactions as well as to exactions of real property.

B. Exactions Abuse Is Having Deleterious Legal and Economic Effects Nationwide

The increasing tendency of government to demand payments or other concessions in exchange for permission to use land is having far-reaching negative consequences in the law and the economy. Although information is not available for the economic effects of these exactions on business property, there are extensive studies of their effect on the housing market. Exactions in exchange for permission to build are increasingly

common with regard to residential construction, and without action by this Court, are likely to worsen.

In one recent case, *Ahmad v. City of Elk Grove*, No. 05CS01760 (Sacramento Super. Ct. filed Dec. 22, 2005), a married couple was ordered to pay more than $240,000 in "roadway fees" and to dedicate a six-foot "landscape easement" along one side of their property in exchange for a permit allowing them to construct a single family home on their property in Elk Grove, California. After negotiations, the city decreased its demand to $142,000. Only after a lawsuit was filed in state court by attorneys from amicus PLF did the city reduce its demand; the parties settled on the amount of $9,750.

In another case currently being litigated by attorneys from amicus PLF, the Griswold family of Carlsbad, California, was ordered to pay almost $115,000 for street improvements in exchange for a building permit that would allow them to add three rooms to their home. *Griswold*, No. 06-CV-1629-R-LSP. In the alternative, the city allowed the Griswolds to defer this payment *if they signed a contract waiving their right to vote* on property assessments—a right guaranteed by the state constitution. City officials later told reporters that "development is a privilege and development is allowed to be conditioned." Michael Burge, *Property Rights at Issue*, San Diego Union-Tribune, Aug. 16, 2006, *available at* 2006 WLNR 14318080. Thus government could demand what it wanted from a property owner seeking a permit.

State and local governments are routinely using their police powers to demand that property owners give up their rights in exchange for reprieve from government land use controls. As this case reveals, a similar risk is posed by the use of eminent domain for private development. At bottom, the same issue is involved: government is demanding payment in exchange for allowing a property owner to use his or her land. Certiorari is warranted in this case to clarify the constitutional

limits on state actors' ability to demand payment in exchange for respecting their property rights.

The continuing exploitation of the police power as a tool for demanding concessions from property owners is having deleterious effects on the national housing market, and those effects are an indication of what will likely result if similar exploitation of the eminent domain power is allowed to continue. Official demands that property owners give up some portion of their rights in exchange for permission to use their property has become a leading cause of increased housing scarcity: one recent report found that nationwide, more than 30 percent of the entire value of houses is "attributable to prices inflated by planning-induced housing shortages." Randal O'Toole, American Dream Coalition, *The Planning Penalty: How Smart Growth Makes Housing Unaffordable* 2 (Mar. 2006).[4] Other research substantiates this finding. *See, e.g.*, Edward L. Glaeser, et al., The Manhattan Institute, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices* (Aug. 30, 2004)[5] ("available data indicate that especially in expensive coastal areas, there often is a substantial gap between the price of housing and construction costs. This gap suggests the power of land use controls in limiting new construction." *Id.* at 37).

In fact, the cost of permission to build—very often in the form of exactions demanded in exchange for building permits—is the *single largest element* in the cost of new housing, and in some places, such as California, that cost is extremely severe. Edward L. Glaeser, et al., *Why Have Housing*

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[4] *Available at* http://www.americandreamcoalition.org/Penalty.pdf (last visited Dec. 8, 2006).

[5] *Available at* http://www.economics.harvard.edu/faculty/glaeser/papers/Manhattan.pdf (last visited Dec. 8, 2006).

Prices Gone Up? (Dec. 28, 2004).[6] It is reasonable to assume that exactions are having similar effects on the cost of business property construction, and that these costs are being passed on to the consumer in the form of higher prices. *See also* John Landis, et al., Cal. Dep't of Hous. & Comm. Dev., *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* 103 (Aug. 2001)[7] (reporting that California home builders in 1999 paid fees averaging $24,325 per single-family home); Marla Dresch & Steven M. Scheffrin, Pub. Policy Inst. of Cal., *Who Pays for Development Fees and Exactions?* at v (June 1997)[8] ("fees imposed on new construction are significant, typically falling in the range of $20,000 to $30,000 per dwelling.") According to the California's Department of Housing and Community Development, the state "leads the nation in imposing fees on new residential development . . . . which vary widely from jurisdiction to jurisdiction, often with no explicit rationale. They average $20,000 to $30,000 per unit and account for more than 15 percent of new home prices in jurisdictions providing substantial shares of affordable housing." State of California Little Hoover Commission, *Rebuilding the Dream: Solving California's Affordable Housing Crisis* 39 (May 2002).[9]

By raising the cost of producing new houses, impact fees and other exactions are steadily raising the cost of

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[6] *Available at* http://post.economics.harvard.edu/faculty/glaeser/papers/Housing_Prices.pdf (last visited Dec. 8, 2006).

[7] *Available at* http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf (last visited Dec. 8, 2006).

[8] *Available at* http://www.ppic.org/content/pubs/report/R_697SSR.pdf (last visited Dec. 8, 2006).

[9] *Available at* http://www.lhc.ca.gov/lhcdir/165/report165.pdf (last visited Dec. 8, 2006).

housing—with the impact falling hardest on first-time home buyers and other newcomers to residential areas. Landis, et al., *supra*, at 107 ("Fees are highest relative to housing prices in the State's fastest growing and most affordable communities"). *See also* Edward Stringham, et al., *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 Boston U. Pub. Int. L. J. ____ (forthcoming, 2006) ("In the long run, high fees give developers an incentive to build more expensive homes . . . [and] to target higher income buyers who may be less sensitive to price increases. Ultimately, fewer buyers can qualify to purchase homes than otherwise because of excessive impact fees.")

As local government officials exploit the unsettled nature of the exactions jurisprudence that has developed in the years since *Nollan* and *Dolan*, these harmful consequences will only increase, making housing more scarce and therefore more difficult for poor and middle class first-time home buyers to enter the housing market. And if officials or developers use the threat of eminent domain to demand concessions from owners of business properties, as in this case, similar economic problems are likely to result. Granting certiorari in this case to clarify the constitutional limits on government's power to demand payment in exchange for permission to use property would help to fix this serious national problem.

III

LOWER COURTS NEED GUIDANCE AS TO THE LIMITS THAT *KELO* PLACES ON THE DISCRETION OF LOCAL OFFICIALS

This case overlaps the categories of *Nollan*, which involved the exploitation of the police power, and *Kelo*, which involved the use of eminent domain for economic development. This indicates the need for this Court not only to address the exactions issue raised here, but also to clarify the limits on eminent domain under the Fifth and Fourteenth Amendments.

In *Kelo*, the Court held that government has broad discretion to use eminent domain to transfer property to different owners for purposes of economic development. Although a plurality of the Court rejected the application of any scrutiny higher than rational basis review, 125 S. Ct. at 2664, Justice Kennedy explained in his concurrence that when a court is "confronted with a plausible accusation of impermissible favoritism to private parties," it ought to "treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." 125 S. Ct. at 2669. This presumption might be abandoned in cases in which "the risk of undetected impermissible favoritism of private parties is . . . acute." *Id.* at 2670. This holding is confusing because, without applying heightened scrutiny at the outset, it is inherently difficult for a court to detect "impermissible favoritism." Lower courts therefore need guidance as to where heightened scrutiny should apply.

In *Western Seafood Co. v. United States*, No. 04-41196, 2006 WL 2920809 (5th Cir. Oct. 11, 2006), for example, the court of appeals declined to apply heightened scrutiny in a case in which the condemnation involved a transfer of property to the benefit of a discrete private beneficiary. As part of its redevelopment plan, the City of Freeport is seeking to condemn the property of the Western Seafood company and transfer it to a company owned by an influential developer named H. Walker Royall—a "particular . . . identifiable individual[]," *Kelo*, 125 S. Ct. at 2662—to operate as a private, for-profit enterprise. But the court found that "[t]he evidence provided by Western Seafood does not support the inference that the City exhibited favoritism or has a purpose other than to promote economic development in Freeport." 2006 WL 2920809 at *5. By applying a deferential standard of scrutiny at the beginning of the analysis, the court found that the redevelopment project exists to promote general economic development, and therefore

rejected the use of heightened scrutiny—precisely the sort of scrutiny that might have uncovered the unconstitutional favoritism.

In another recent case, a New Jersey court relying on *Kelo* declared that a person challenging the constitutionality of a taking of her property "can overcome a presumption of validity only by proofs that there could have been *no set of facts* that would rationally support a conclusion that the enactment is in the public interest." *City of Long Branch v. Brower*, 2006 WL 1746120, at *10 (N.J. Super. Ct. June 22, 2006) (emphasis added). Such a high degree of deference makes it practically impossible for a property owner to prevail in court, no matter how suspect the condemnation. As Justice Stevens himself has remarked on more than one occasion, "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (citation omitted). Yet it is difficult to discern how lower courts should enforce *Kelo*'s prohibition on takings which "confer[] a private benefit on a particular private party." 125 S. Ct. at 2661.

The *Kelo* decision was greeted with a nationwide outcry, which included an official resolution in the House of Representatives repudiating the decision. *See* H.R. Res. 340, 109th Cong. (2005). Yet in the one year after the *Kelo* decision was announced, more than 5,000 properties across the country were condemned or threatened with condemnation for various private development projects—more than three times the national average for a one-year period. *See* Dana Berliner, Institute for Justice, *Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World* 2-3 (June 2006).[10] In fact, one of the primary concerns raised by *Kelo* is that private developers

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[10] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (last visited Dec. 8, 2006).

will exploit the power of eminent domain for their own private benefit in just the manner alleged in the complaint in this case.

The exploitation of eminent domain to exact a cash payment from a property owner pushes the limits of the *Kelo* decision and is so far removed from the accepted and usual legal proceedings as to call for an exercise of this Court's supervisory power. *See* U.S. Sup. Ct. R. 10(a). The Court should take this opportunity to address the limits on official discretion to take property for private development.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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